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No. 95-1510 MAR 18 1996

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

FRED CASSITY, d/b/a C & B TRUCKING - *Petitioner,*

versus

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI
FROM DECISION OF THE
SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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March 16, 1996

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41 pp

QUESTION PRESENTED

1. Whether a Kentucky law, which provided a statutory right of appeal from a final order of the Transportation Cabinet, satisfied due process where the Cabinet failed to enact a hearing procedure to generate a final order from which to appeal.

SUP. CT. R. 14.1(b) LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of this petition.

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No. _____

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FRED CASSITY, d/b/a C & B TRUCKING - - - *Petitioner,*

v.

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET - - - - *Respondent.*

PETITION FOR WRIT OF CERTIORARI FROM DECISION OF THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

Petitioner, Fred Cassity, d/b/a C & B Trucking ("Cassity"), respectfully prays that a writ of certiorari issue to review the opinion and order of the Supreme Court of Kentucky entered on December 21, 1995.

OPINIONS BELOW

1. The Supreme Court of Kentucky reversed the decision of the Court of Appeals of Kentucky in *Transportation Cabinet, Commonwealth of Kentucky*, appellant v. *Fred Cassity, d/b/a C & B Trucking*, appellee, Case No. 94-SC-894-DG entered December 21, 1995. It is reprinted in the appendix hereto, pp. 1a-6a, *infra*.

2. The Court of Appeals of Kentucky affirmed the decision of the Pike Circuit Court in *Transportation Cabinet, Commonwealth of Kentucky*, appellant v. *Fred Cassity, d/b/a C & B Trucking*, appellee, Case No. 93-CA-1130-MR entered October 14, 1994. It is reprinted in the appendix hereto, pp.7a-12a, *infra*.

3. Pike Circuit Court, Division One, entered Judgment for plaintiff on the issue of damages in *Fred Cassity*, plaintiff v. *Milo Bryant, et al*, defendant, Case No, 88-CI-667, entered April 14, 1993. It is reprinted in the appendix hereto, pp. 13a-16a, *infra*, and denoted therein as Findings of Fact, Conclusions of Law and Judgment.

4. Pike Circuit Court, Division One, entered Judgment for plaintiff on the issue of liability in *Fred Cassity, d/b/a C & B Trucking*, plaintiff v. *Transportation Cabinet, Commonwealth of Kentucky*, defendant, Case No. 88-CI-667, entered February 2, 1990. It is reprinted in the appendix hereto, pp. 17a-21a, *infra*, and is denoted therein as an Order.

JURISDICTION

Petitioner filed an action pursuant to 42 U.S.C. § 1983 contesting the constitutionality of respondent's impoundment procedure. Cassity prevailed at trial, and before the Court of Appeals of Kentucky. Thereafter, the Supreme Court of Kentucky entered an Opinion and Order reversing the Court of Appeals on December 21, 1995. There has been no application by either party to this petition for a rehearing or for extension of time in the Supreme Court of Kentucky. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The United States Constitutional provision involved in this case is contained in the Fourteenth Amendment, Section One, as follows:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The action below was brought pursuant to 42 U.S.C. §1983 which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects or causes to be subjected, any citizens of the United States or other person within jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit inequity, or other proper proceeding for redress.

The following four (4) statutes of the Commonwealth of Kentucky are involved in this case:

> 1. KRS 138.720. Prohibited acts. — With respect to KRS 138.655 to 138.725, it is unlawful for any person to:
>
> (1) Fail to pay the tax imposed;
>
> 2. KRS 138.725(1). Administration by Department of Vehicle Regulation — reciprocity in furnishing information. — (1) The Department of Vehicle Regulation shall administrator the provisions of KRS 138.655 to 138.725 and 138.990, and may prescribe, adopt and enforce regulations relating to the administration and enforcement thereof.
>
> 3. KRS 138.729. Appeal — Any final ruling of the Department of Vehicle Regulation with regard to the administration of KRS 138.655 to 138.725 shall be appealed to the Kentucky Board of Tax Appeals.

> 4. KRS 138.990(15). Penalties — In addition to the penalties provided in KRS 138.990(14), the motor vehicle or vehicles of any person violating any provisions of KRS 138.720 shall be subject to seizure by any officer duly authorized to enforce the provisions of KRS 138.655 to 138.725.

The Kentucky Transportation Cabinet has not adopted any regulatory procedure for hearing alleged violations of KRS Chapter 138, including KRS 138.720.

STATEMENT OF THE CASE

Petitioner, Fred Cassity, is an independent businessman engaged in the inter-state business of hauling coal. He owned a 1985 Kenworth tractor/trailer which carried a Virginia registration plate and apportioned cab card designating Kentucky as one of the states of operation.

On April 8, 1988, a Kentucky Transportation Cabinet Enforcement Officer stopped Cassity's truck and cited the driver for civil violations of (1) KRS 138.665, no Kentucky motor fuel users license; (2) KRS 281.615, no authority; (3) KRS 186.150, resident not to use out-of-state license; and (4) 189.222, overweight. The officer seized and impounded Cassity's truck pursuant to KRS 138.990(15).

The Cabinet's citation directed Cassity to appear in Pike District Court on April 26, 1988. Cassity appeared before the Pike District Court pursuant to the Cabinet's citation, but District Judge Elswick indicated that he had no jurisdiction over an Administrative citation and referred the matter back to the Transportation Cabinet for a hearing.

After the officer cited and seized Cassity's truck, respondent refused to release the truck or allow Cassity to post bond and retrieve his property for use in other jurisdictions while he sorted out the charges. Respondent had no procedure for reviewing an officer's citation to deter-

mine whether or not the alleged civil violation in fact occurred. Moreover, respondent had no procedure which would allow an owner to post bond to recover his vehicle. The impounding officer gave Cassity a hand-written list of items to complete to obtain the release of the vehicle.

The Transportation Cabinet failed to conduct a hearing in this case to review its charges, or to hear evidence of either party. Respondent failed to conduct a hearing to determine, based on all the evidence, whether or not the allegations in the civil citation were true or false. There was no post-seizure hearing, be it judicial or administrative, as of the date of this trial, January 3, 1989, and none was scheduled.

Cassity's efforts to obtain the release of his truck were completely unsuccessful. His tractor was repossessed by secured creditor Citizens Bank in Pikeville on May 23, 1988. The bank's records showed that Cassity was current in his payments as of April 8, 1988, the date of the seizure, but he was Two Thousand Four Hundred Forty-eight Dollars and Seven Cents ($2,448.07) behind in his payments at the time of repossession. As a direct result of the Cabinet's impoundment, Cassity lost a contract to haul coal with Inter Mountain Coal, as well as profits of One Thousand Five Hundred Dollars ($1,500.00) per month. Cassity was unable to make his payments to Citizens Bank due to his lost income. As a result, he also lost his equity in the truck when the bank repossessed the equipment. Further, he was deprived of his option to purchase the equipment upon termination of the lease.

Cassity brought an action pursuant to 42 U.S.C §1983 in the Pike Circuit Court at Pikeville, Kentucky on May 11, 1988, alleging that the Cabinet deprived him of rights secured by the Fourteenth Amendment of the United States Constitution.

The Pike Circuit Court held a bench trial on the merits of the case below on January 3, 1989. The parties stipu-

lated on the record, and the court found, the following facts at trial:

> 1. On April 8, 1988, defendant Martin Slone, acting in his capacity as a highway enforcement officer, stopped the plaintiff's tractor/trailer and cited the driver for violations of KRS 138.665 (no Kentucky fuel users license); KRS 281.615 (no authority); KRS 186.150 (resident not to use out-of-state license); and KRS 189.222 (vehicle overweight).
>
> 2. The defendants thereupon seized and impounded the tractor/trailer pursuant to KRS 138.990(18) and the Transportation Cabinet's usual enforcement procedures.
>
> 3. The defendants acted in their official capacities and under color of state law and Cabinet regulations at all times pertinent to this action.
>
> 4. A hearing on the citations was scheduled in Pike District Court for April 26, 1988; however, the district court ruled that it was without jurisdiction regarding the seizure and referred the matter back to the Transportation Cabinet.
>
> 5. As of January 3, 1989, the Cabinet had not conducted any administrative hearing to determine whether the impoundment was lawful and proper.
>
> 6. The defendants released the subject trailer on May 20, 1988, to C & B Trucking, and released the Kenworth tractor on May 23, 1988 to the Citizens Bank of Pikeville.

There was no evidence presented at trial that Fred Cassity owed any motor fuel users tax or that his KYU license was revoked.

The Pike Circuit Court considered a single question of law:

> "Whether the seizure and impoundment of the plaintiff's truck, with no hearing either before the seizure or afterwards, deprived the plaintiff of a prop-

erty interest without due process of law, and in violation of the Fourteenth Amendment to the United States Constitution." See p. 18a, *infra*.

The Pike Circuit Court noted that the legislature made no express provision for proceedings following the seizure of a vehicle pursuant to KRS 138.990(18), and the Cabinet had instituted no hearing process. The court found, because "there was available to the plaintiff no hearing, judicial or administrative, pre-or post-seizure; it is, beyond question, that such application of the statute deprives a person of property without due process of law." See p. 20a, *infra*.

Respondent contended in the Pike Circuit Court that Cassity could have had a prompt post-seizure hearing before the Kentucky Board of Tax Appeals pursuant to KRS 138.729 which provides: "any final ruling of the Bureau of Vehicle Regulations with regard to 138.725 shall be appealed to the Kentucky Board of Tax Appeals." The Pike Circuit Court rejected that argument, noting "the difficulty with this argument is, that in this case there was no "final ruling" of the agency from which to appeal." See p. 20a, *infra*. The court concluded, "the defendants did, acting under color of state law, deprive the plaintiff of a property interest without due process of law, and in violation of the United States Constitution." See p. 21a, *infra*. The court reserved the issue of damages for future determination.

The Pike Circuit Court entered its final order resolving the issues of damages on April 14, 1993. See pp. 13a-16a, *infra*.

Respondent appealed the judgment of the Pike Circuit Court to the Court of Appeals of Kentucky contending that the Pike Circuit Court erred in holding that Cassity was denied due process in the taking of property, or, in the alternative, that respondent had the power to seize the tractor/trailer on the basis of the Commonwealth's power to tax.

Cassity responded that the lower court's ruling was correct, that the facts were stipulated at trial, that seizing the truck based upon a civil citation without affording the owner notice and the opportunity to be heard on the allegations in the citation violated the Fourteenth Amendment to the United States Constitution.

The Court of Appeals of Kentucky rendered a decision on October 14, 1994 affirming the decision of the Pike Circuit Court. The Court of Appeals recognized that "the Commonwealth's police power entitles it to take appropriate measures against individuals whose vehicles are in violation of commercial vehicle regulations. However, the Commonwealth does not have the authority to deprive a citizen of his property *without due process of law*." (Emphasis in original). See p. 9a, *infra*.

The Court of Appeals rejected the Cabinet's argument that Cassity's opportunity for review of the licensing and/or taxing scheme prior to the seizure of his vehicle satisfied due process noting:

> "We do not contest the adequacy of these remedies for challenging the cancellation of one's license or the amount of tax assessed by the Cabinet, or similar administrative protest. These procedures do not, however, address the critical issue in this case — whether Cassity was unjustly deprived of his property. As noted by the United States Supreme Court, "[t]he requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivations of property. *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972). Cassity was afforded absolutely no pre — or post — deprivation hearing at which to determine whether the seizure of his vehicle was arbitrary." See p. 9a, *infra*.

The Court of Appeals recognized,

> "[t]he heart of the issue is not whether the Commonwealth had the right under its police power or its taxing power to impound appellee's vehicle but whether the procedures they employed adequately protected his rights under the due process clauses of the United States Constitution. Since no hearing was ever provided either before or after the seizure of Cassity's tractor/trailer, the minimal requirements of due process — notice and some type of hearing — were not met." See p. 13a, *infra*.

Respondent appealed the Decision of the Court of Appeals of Kentucky to Supreme Court of Kentucky. Respondent argued once again that there was no due process taking of property or in the alternative, that the Commonwealth had the right to seize Cassity's truck pursuant to its taxing power. Respondent also contended for the first time that it was immune from suit. Cassity argued that the seizure of private property based upon an unadjudicated citation violates Fourteenth Amendment due process, and responded that the Respondent waived the defense of sovereign immunity by failing to raise the issue before.

Following oral arguments, the Kentucky Supreme Court issued a decision reversing the Court of Appeals, holding that due process did not require the respondent to conduct a hearing to determine whether or not petitioner violated KRS 138.720 before seizing his truck because KRS 138.729 provides an avenue of appeal to the Board of Tax Appeals from any final ruling of the Department of Vehicle Regulation. The Kentucky Supreme Court held, "once the enforcement officer is notified that the vehicle has no KYU, there is no question of fact to be resolved." See p. 5a, *infra*. That Court further held, "here due process was completely satisfied when [Cassity] was notified of the revocation because the only possible issue he could raise was that of clerical error. Where there is the possibility of

clerical error, written objection will bring such a matter to the attention of the agency administering the revocation." See p. 4a, *infra*.

The Kentucky Supreme Court considered the risk of erroneous deprivation low because of the Transportation Cabinet's procedures. After stopping a vehicle, the enforcement officer calls the KYU number into a superior officer who calls the Division of Motor Carriers who calls the Department of Revenue, who runs a record check to determine whether or not the individual has a valid KYU. Revenue conveys the information back to the Division of Motor Carriers, who replies to the superior officer who responds to the enforcement officer who impounds the truck. Based upon that procedure, the Kentucky Supreme Court held, "thus, the risk of mistaken impoundment is low." See p. 6a, *infra*. The Kentucky Supreme Court also concurred in the Cabinet's argument that "the Transportation Cabinet would incur enormous administrative and financial burdens if they were required to institute a post seizure hearing process . . ." See p. 5a, *infra*. The Supreme Court agreed with the Transportation Cabinet's assertions that due process was not violated because Cassity had an opportunity for a hearing. The Court noted, "additionally, KRS 138.729 provides that" [a]ny final ruling of the Department of Vehicle Regulation with regard to the administration of KRS 138.655 to 138.725 shall be appealed to the Kentucky Board of Tax Appeals." The Court concluded, "therefore, Cassity's federal and state due process protections have been satisfied." See p. 5a, *infra*.

The Kentucky Supreme Court held that the Transportation Cabinet waived the defense of sovereign immunity by not raising the issue below and declined to address the merits of that defense.

REASONS FOR GRANTING THE WRIT

I. The Kentucky Supreme Court Has Authorized the State of Kentucky to Seize Privately Owned Personal Property Based Upon an Administrative Citation for Non-Payment of Tax, Without Holding a Due Process Trial Type Hearing to Determine Whether or Not the Citizen in Fact Owed the Tax.

The Kentucky Supreme Court has authorized, by decision, the Transportation Cabinet's ongoing practice of seizing and impounding commercial vehicles when the owner is cited, not convicted, of violating KRS 138.720. The Court reasoned that it was not necessary for the Cabinet to enact any procedure for hearing the merits of those citations because KRS 138.729 provides that "any final ruling of the Department of Vehicle Regulation with regard to the administration of KRS 138.655 to KRS 138.725 shall be appealed to the Kentucky Board of Tax Appeals."

The parties stipulated at trial, and the Pike Circuit Court found, that the Transportation Cabinet had no administrative proceeding for hearing and deciding alleged civil violations of KRS Chapter 138. The Kentucky Supreme Court's ruling has determined that due process is satisfied if the legislature enacts a statute providing an avenue of appeal, regardless of whether the agency enacts the hearing procedure for obtaining a final ruling from which to appeal. In this case, as there was no administrative hearing procedure in place, there could be no final ruling and Cassity's statutory right of appeal was worthless.

This Court considered the issue of ex parte seizure of forfeitable property in *Calero — Toledo* v. *Pearson Yacht Leasing Company*, 416 U.S. 663 (1974). That case held that the government could seize a yacht subject to civil forfeiture without affording prior notice or a hearing. This Court noted that a yacht is the type of property that could

be removed to another jurisdiction, destroyed or concealed, which merited postponing notice and the hearing until after the seizure. *Id.* at 678 (quoting *Fuentes* v. *Shevin*, 407 U.S. at 91).

The Kentucky Supreme Court has gone a step beyond *Calero — Toledo* v. *Pearson Yacht Leasing Company* because it has decided that Kentucky need not hold a hearing at all if the Kentucky citizen is cited for non-payment of Kentucky Motor Fuel User's Tax. The Kentucky Supreme Court held that it would be too expensive and burdensome upon the citing agency to require it to hear the merits of those administrative citations either before or after seizing privately held vehicles.

This Court has long held that people in Cassity's position have a constitutionally protected interest in the continued possession and use of their personal property. *Fuentes* v. *Shevin*, 407 U.S. at 573 (1972). This Court condemned governmental deprivation of private property without giving the owner notice and the opportunity to be heard, noting, "the Constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it asks to deprive a person of his possessions." 407 U.S. at 81.

This Court has always recognized that fairness can rarely be obtained by a secret one-sided determination of facts dissuasive of rights. Most recently, this Court recognized that even if a citizen has been convicted of a crime, the government must still provide the defendant notice and the opportunity to be heard before seizing forfeitable real property based upon that conviction. This Court noted, "finally, the suggestion that this one petitioner must lose because his conviction was known at the time of seizure, and because he raises an applied challenge to the statute, founders a bedrock proposition "*fair procedures are not confined to the innocent.* The question before us is the legality

of the seizure, not the strength of the government's case." *United States* v. *James Daniel Good Real Property, et al,* 510 U.S. ____ (1993)

Cassity's case is far more egregious than *James Daniel Good, Real Property, et al.* There is no evidence at all that Cassity owed the Commonwealth any tax at the time his truck was seized. Cassity maintained throughout the course of this proceeding that his taxes were current. This case demonstrates the worst possible abuse of the Fourteenth Amendment to the United States Constitution: a law abiding tax payor's private property is arbitrarily seized by the state, which denies him any avenue of review of the state action, any ability to appeal the state action, or even the most basic remedy of posting bond to retrieve his property for continued use while he contests the state action.

II. The Kentucky Supreme Court Has Authorized a Forfeiture Procedure, With Respect to Personal Property, Which This Court Held Unconstitutional With Respect to Real Property.

Cassity does not dispute that the Commonwealth of Kentucky has the power to seize a citizen's private property to satisfy unpaid taxes. However, Kentucky's procedure in exercising that power in this instance is constitutionally flawed.

Respondent did not seize Cassity's truck with the intention to apply the proceeds to the alleged unpaid taxes. The truck was seized pursuant to an impoundment statute. Respondent intended to hold the truck hostage until Cassity completed a handwritten list of items given to him by the enforcing officer. Although the Kentucky Supreme Court reasoned that Cassity had notice of the tax liability and the opportunity to appeal to the Board of Tax Appeals, there is no suggestion in the parties' factual stipulations at trial that Cassity was delinquent in his taxes, or that his license was in fact revoked. Cassity's truck was seized

pursuant to an arbitrary impoundment statute, based upon an unadjudicated civil citation for alleged non-payment of tax.

United States v. *James Daniel Good Real Property, et al,* clarified the law with respect to the ex parte seizure of real estate pursuant to an unadjudicated charge. This court is respectfully requested to extend the procedural protections set forth in *James Daniel Good Real Property, et al,* with respect to real estate, to the protection of privately held personal property as set forth in this case.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted. If the petitioner is correct in urging that the Kentucky Supreme Court erred in reversing the Court of Appeals' decision affirming the decision of the Pike Circuit Court, the petitioner respectfully requests this Court to reverse the decision of the Kentucky Supreme Court.

Respectfully submitted,

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APPENDIX

RENDERED: DECEMBER 21, 1995
TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

94-SC-894-DG

TRANSPORTATION CABINET
COMMONWEALTH OF KENTUCKY - - - - *Appellant*

v.

FRED CASSITY, d/b/a C & B TRUCKING - - - *Appellee*

Appeal From Court of Appeals
93-CA-001130
Pike Circuit Court
Honorable Bayard V. Collier, Judge
(88-CI-667)

OPINION OF THE COURT BY CHIEF JUSTICE STEPHENS—REVERSING

This appeal was brought by the Transportation Cabinet after a determination by the Court of Appeals that the Cabinet's procedure for enforcing KRS 138.990 is unconstitutional. A Transportation Cabinet enforcement officer issued Cassity four citations for statutory violations and immediately thereafter impounded his tractor and trailer. Cassity filed an action pursuant to 42 U.S.C. §1983 (hereinafter §1983) to recover damages suffered as a result of the loss of his equipment.

The issue is whether the Transportation Department's procedure for enforcement of KRS 138.990 results in a deprivation of procedural due process and is therefore unconstitutional.

Cassity's truck was stopped by Office Slone on April 8, 1988, for a routine random safety inspection. Ultimately, the driver was issued four citations which were unrelated

to the safety inspection. The citations which resulted in impoundment of the truck were: 1) no Kentucky motor fuel user's license (hereinafter KYU), KRS 138.665; and, 2) an expired extended weight decal, KRS 189.222. Driving with no KYU subjects the vehicle to mandatory impoundment. While driving with an expired extended weight decal subjects the vehicle to possible impoundment, such is not mandatory. The impoundment was carried out pursuant to KRS 138.950(15). The citations informed Cassity that a hearing would be held on April 26, 1988, in Pike County District Court. Cassity appeared in Pike District Court and was informed by the trial judge that the court did not have jurisdiction to hear the matter. Further, the court referred Cassity to the Cabinet for a hearing.

Office Slone, upon issuing the citations, gave the driver a handwritten list of items required for the release of the vehicle. Those items were: 1) a KYU, with interstate for hire authority listed on the license; 2) Kentucky base registration plate required for all Kentucky residents; and, 3) a new extended weight decal. Additionally, the list contained the telephone numbers of the agencies Cassity needed to contact. Cassity did not obtain any of these items.[1] There was no hearing held to adjudicate the criminal penalties attached to the citations. Subsequently, Cassity's tractor was repossessed by his creditors from the impoundment lot. Cassity then filed the §1983 action alleging damages resulting from deprivation of his constitutionally protected right to procedural due process under the Fourteenth Amendment of the United States Constitution and §2 of the Kentucky Constitution.

Initially, it is important to understand the statutory provisions which govern the actions taken. The Transportation Cabinet serves as the enforcement agency for the

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[1]There is an application for an extended weight decal in the record but there is no evidence the decal was actually received by Cassity.

Revenue Cabinet with regard to motor carriers that do not pay their usage tax. KRS 138.725. This tax is paid through the issuance of a KYU. KRS 138.665. It is unlawful to operate on Kentucky highways without this license. KRS 138.720[2] If cited for operation without this license, impoundment by the Transportation Cabinet is mandatory. KRS 138.990(15).[3] Pursuant to Transportation Cabinet policy, the enforcement officer must receive authority from a superior officer before impounding a vehicle. The superior officer would contact the Division of Motor Carriers to ascertain the status of the vehicle in question. Once the violation has been confirmed, the authority to impound is passed to the enforcement officer in the field and the vehicle is impounded. There is no regulation or statute that provides for a hearing at any time during these events.

The Transportation Cabinet asserts there is no due process violation because Cassity had an opportunity for a hearing concerning his KYU revocation.[4] KRS 138.675 provides an opportunity for a showing of reasonable cause for failure to pay motor carrier taxes before the license revocation becomes final. The Division of Motor Carriers has a standard procedure whereby an initial notice is sent to the license holder sixty days before cancellation. The

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[2]KRS 138.720. Prohibited acts. - With respect to KRS 138.655 to 138.725, it is unlawful for any person to:

(1) Fail to pay the tax imposed;

. . .

(4) Conduct any activities requiring a license without such license or after such license has been surrendered, canceled or revoked; . . .

[3]KRS 138.990(15) - In addition to the penalties provided in KRS 138.990(14), the motor vehicle or vehicles of any person violating any provision of KRS 138.720 shall be subject to seizure by any officer duly authorized to enforce the provisions of KRS 138.655 to KRS 138.725.

[4]Records indicate that Cassity's KYU was revoked in 1978 for failure to maintain a fuel tax bond.

notice informs the license holder of the deficiencies which allows an opportunity to challenge the cancellation action or to correct the deficiencies. Additionally, KRS 138.729 provides that "[a]ny final ruling of the department of vehicle regulation with regard to the administration of KRS 138.655 to 138.725 shall be appealed to the Kentucky board of tax appeals." We agree that these statutes provide a motor carrier with an opportunity for a hearing concerning the revocation of the license. Again, once the license is revoked the motor carrier is subject to mandatory impoundment when using roadways within the state.

This Court's decision in *Division of Driver Licensing v. Bergmann*, Ky., 740 S.W.2d 948 (1987), is dispositive on this issue. In *Bergmann*, the statutory scheme was similar to the statutes involved herein. *Bergmann* concerned the mandatory revocation of a driver's license once the individual was convicted of a second DUI offense. We found no due process violation there because Bergmann had been given an opportunity for a hearing "at each of his two DUI convictions." *Id.* at 951. In this instance, once the KYU has been revoked, impounding of a vehicle operating without that license is mandatory. "The legislature provided no appeal provisions from" an impoundment. *Id.* at 950. Further, Cassity had an opportunity for a hearing when his license was revoked. As noted in *Bregmann*, "[t]here is no additional right to dispute the automatic orders" when a previous opportunity to be heard was provided. *Id.*

Once the enforcement officer is notified that the vehicle has no KYU, "there is no question of fact to be resolved." *Id.* Cassity had the opportunity, after the impoundment, to correct any clerical errors, regarding the KYU or the extended weight decal, which may have existed with the Division of Motor Carriers. As we have held:

> Here due process was completely satisfied when [Cassity] was notified of the revocation because the only possible issue he could raise was that of clerical error. Where there is the possibility of clerical error, written objection will bring such a matter to the attention of the agency administering the revocation.

Bergmann, 740 S.W.2d at 951.

Furthermore, the three-prong analysis found in *Matthews* v. *Eldridge*, 424 U.S. 319 (1976), to test due process concerns for those individuals whose protected interests are subject to state action is satisfied. The factors to be considered are: 1) the nature and weight of the private interest that will be affected by the action challenged; 2) the risk of erroneous deprivation of such interest; and, 3) the governmental function involved and state interest served by such procedures, as well as administrative and fiscal burdens that would result from additional or substituted procedures. This Court has employed this analysis in testing procedural due process challenges. *Commonwealth* v. *Raines*, Ky., 847 S.W.2d 724 (1993).

Although Cassity's interest in his vehicle is significant, it is counter balanced with the state's compelling interest in collecting tax revenues. The risk of erroneous deprivation is low considering the procedures the Transportation Cabinet follows before impounding the vehicle. The enforcement officer must call into a superior officer who then checks with the Division of Motor Carriers. The Division of Motor Carriers runs a record check to determine if the individual has a valid KYU and is thus not delinquent in his tax payments. Once the status of the license is confirmed, the superior officer then informs the enforcement officer to impound the vehicle. Thus, the risk of mistaken impoundment is low. Additionally, the Transportation Cabinet would incur enormous administrative and financial burdens if they were required to institute a post-seizure hearing process, given the large number of citations issued. Therefore, Cassity's federal and state due process protections have been satisfied.

The Transportation Cabinet raised the issue of sovereign immunity as a defense to the §1983 action. The Transportation Cabinet waived this defense by not raising the issue below and we decline to discuss the merits.

The decision of the Court of Appeals is reversed with the case remanded to the circuit court for further proceedings in accordance with this opinion.

All concur.

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NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

93-CA-1130-MR

TRANSPORTATION CABINET,
COMMONWEALTH OF KENTUCKY - - - - - *Appellant*

v.

FRED CASSITY, - - - - - - - - - - *Appellee*

Appeal From Pike Circuit Court
Honorable Bayard V. Collier, Judge
Action No. 88-CI-0667

OPINION—AFFIRMING

BEFORE: COMBS, DYCHE, and GUDGEL, Judges.

COMBS, JUDGE: This is an appeal of the decision of the Pike Circuit Court awarding damages to the Appellee for the deprivation of his constitutional rights in violation of 42 U.S.C. § 1983.

Appellant, the Transportation Cabinet, Commonwealth of Kentucky ("Cabinet"), impounded a tractor-trailer operated by the Appellee, Fred Cassity ("Cassity"). Cassity contends that his truck was seized in violation of his right to due process. The Cabinet asserts that the court's ruling is clearly erroneous because no actual "taking" has occurred. The Cabinet claims to have had the power to seize Cassity's truck pursuant to the Commonwealth's power to tax and that the Appellee was afforded the requisite procedural safeguards. The circuit court disagreed and found that the Appellant had deprived the Appellee of a property interest without due process of law by impounding Appellee's truck without conducting a pre- or post-deprivation hearing. We agree and affirm the decision of the Pike Circuit Court.

Appellee Fred Cassity, d/b/a C&B Trucking ("Cassity"), is an independent business man engaged in the business of hauling coal in interstate commerce. On April 8, 1988, Cassity was cited by the Appellant, Transportation Cabinet ("Cabinet"), for four violations. A Cabinet employee, enforcement officer Martin Slone ("Slone"), cited Cassity for: (1) no Kentucky motor fuel users license, K.R.S. 138.665; (2) no authority, K.R.S. 281.615; (3) resident not to use out-of-state license, K.R.S. 186.150; and (4) overweight, K.R.S. 189.222. The alleged violation at issue here is operating the tractor/trailer with a suspended license. K.R.S. 138.665 & K.R.S. 138.720. As a result of these cited offenses, Cassity's tractor and trailer (containing coal not the property of Cassity) were impounded.

Following the issuance of these citations, the Cabinet directed Cassity to appear before the Pike District Court on April 26, 1988. Cassity appeared before the court on the date instructed. However, the district court judge indicated that he had no jurisdiction and referred the matter back to the Cabinet for a hearing. The Cabinet, however, never held a hearing to determine whether the allegations contained in the citations were true or false.

The trailer was eventually released to an agent of Cassity's on May 20, 1988. The tractor was repossessed by Citizens Bank of Pikeville on May 23, 1988. The bank records indicate that Cassity was current on his payments as of the date of impoundment but that by the date of repossession, he was $2,448.07 in arrears. As a result of the impoundment, he lost his equity in the truck, his option to purchase, his profit potential in the tractor,[1] and his contract to haul coal with Inter Mountain Coal.

Cassity filed his complaint under 42 U.S.C. § 1983. As with any § 1983 action, the initial inquiry must focus on whether the two essential elements are present: (1) whether

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[1]Cassity's records indicated that the particular tractor impounded yielded approximately $1,500.00 in profit per month.

the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. The first element was met as Officer Slone seized Cassity's vehicle pursuant to his authority as a transportation officer. The second element requires a more detailed analysis of the constitutional requirements of due process of law.

The Cabinet first asserts that the court's decision is clearly erroneous because no "taking" has occurred since Cassity's truck was seized pursuant to the Commonwealth's power to tax. We disagree. We do not dispute the Cabinet's assertion that the Commonwealth's police power entitles it to take appropriate measures against individuals whose vehicles are in violation of commercial vehicle regulations. However, the Commonwealth does not have the authority to deprive a citizen of his property *without due process of law*. After Cassity's tractor-trailer was seized, he was instructed to appear before the district court. The court dismissed his claim on jurisdictional grounds. Subsequent to this dismissal, no hearing was held by the Cabinet or any other administrative agency. Meanwhile, his truck remained impounded with no procedural recourse available to Cassity to establish the propriety or impropriety of his loss of valuable property.

The Cabinet contends that the requirements of due process were met in this case. Again, we must disagree. In support of this argument, the Cabinet cites the opportunity for review of the licensing and/or taxing scheme prior to the seizure of Cassity's vehicle. We do not contest the adequacy of these remedies for challenging the cancellation of ones license or the amount of tax assessed by the Cabinet, or similar administrative protests. These procedures do not, however, address the critical issue in this case — whether Cassity was unjustly deprived of his property. As noted by the United States Supreme Court, [t]he requirement of notice and an opportunity to be heard raises

no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property." *Fuentes* v. *Shevin*, 407 U.S. 67, 81 (1972). Cassity was afforded absolutely no pre- or post-deprivation hearing at which to determine whether the seizure of his vehicle was arbitrary.

The fundamental requisites of due process are the *opportunity to be heard* and "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 314 (1950). At a minimum, due process requires that a deprivation of property be preceded by notice and a hearing "appropriate to the nature of the case." *Id.* at 313. These procedural safeguards attach not only to permanent deprivations of property, but also to temporary, nonfinal deprivation of property. *Fuentes*, 407 U.S. at 84-85. The opportunity to be heard must, furthermore, be provided "*at a meaningful time* and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) (emphasis added).

Due process requires a hearing prior to deprivation of property except "for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie* v. *Connecticut*, 401 U.S. 371, 379 (1971). This exception applies when

> the (procedure) has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the state has kept strict control over its monopoly of legitimate force; the person initiating the seizure has been a governmental official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance.

Reilly v. *Washington*, 566 P.2d 1383, 1287 (Wash. App. 1977).[2]

The heart of the issue is not whether the Commonwealth had the right under its police power or its taxing power to impound Appellee's vehicle, but whether the procedures they employed adequately protected his rights under the due process clause of the United States Constitution. Since no hearing was ever provided either before or after the seizure of Cassity's tractor-trailer the minimal requirements of due process — notice and some type of hearing — were not met. As a result, a relatively prosperous truck driver, current on his payments and enjoying a healthy profit on his truck, lost virtually his entire economic well-being and fell through the cracks of the administrative process that failed to provide him due process. The severity of the punishment as applied so grossly outweighs the alleged offense as to assume nightmarish dimensions reminiscent of Jean Valjean's theft of a loaf of bread costing twenty years of imprisonment. *Les Miserables* should not be repeated in the courts of this Commonwealth. We therefore heartily affirm the decision of the Honorable Judge Collier of Pike Circuit Court.

ALL CONCUR

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[2]In Reilly, the Washington Court of Appeals considered a statutory scheme which authorized impoundment of vehicles without any hearing. Discussing the implications of the extraordinary situation exception, the Court stated:

> [t]he extraordinary-situation exception is not an abolition of due process. Hearing still must follow impoundment promptly, in a reasonable time. . . . This statute authorizes the State to temporarily deprive a person of property without prior notice or hearing, which we have said is constitutionally permissible under extraordinary circumstances, but it fails to insure that the deprived citizen will have notice and an opportunity to be heard. . . .

Reilly, 566 F.2d at 1287-88 (emphasis added).

ATTORNEYS FOR APPELLANT:
William M. Sawyer
Clayton B. Patrick
Frankfort, KY

ATTORNEYS FOR APPELLEE:
Bernard Pafunda
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Pamela Carroll Farmer
Frankfort, KY

DIVISION NO. I

COMMONWEALTH OF KENTUCKY
PIKE CIRCUIT COURT

Action No. 88-CI-667

FRED CASSITY, - - - - - - - - - - *Plaintiff*

v.

MILO BRYANT, et al - - - - - - - - - *Defendant*

FINDING OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT—Entered April 14, 1993

Pursuant to the previous Orders of the Court, and in particular the Order of February 2, 1990 wherein liability was found against the defendants, and the within action having been retained on the docket for resolution of the issue of damages, and the parties have briefed the said issues, and the Court being sufficiently advised, hereby makes the following Findings of Fact, Conclusions of Law and Judgment:

FINDINGS OF FACT

(1) That the Court heretofore entered an Order on February 2, 1990, wherein liability was found against the defendants, jointly and severally, for the deprivation of the plaintiff's right to due process, and violation of 42 USC Section 1983 was found.

(2) That the subject tractor/trailer was utilized by the plaintiff on a regular basis and generated an average of fifteen hundred ($1,500.00) dollars per month net income.

(3) That at the time the truck was impounded, the lease under which the vehicle was operated by the plaintiff had a remaining term of twenty-nine (29) months.

(4) That at the rate of fifteen hundred ($1,500.00) dollars per month, the lost income attributable to the plaintiff's deprivation of use of the vehicle equals forty-three thousand five hundred ($43,500.00) dollars.

(5) That the plaintiff had an option to purchase the truck at the end of the subject lease, but there is no evidence of record indicating that the plaintiff intended to do so.

(6) That after the impoundment of the 1985 Kenworth tractor, possession of the vehicle was turned over to the Citizens Bank of Pikeville, owner-lessor, whereupon the tractor was released to a third party. That because of such fact, the plaintiff had no means by which to mitigate his damages, and the amount of lost profits mentioned in Paragraph three above therefore is not subject to any offset or reduction.

(7) That the defendants, and each of them, were acting within the scope of their authority at all times relevant herein, and such conduct was pursuant to established state procedures and policies. As a result thereof, the Court does not find the requisite mental state present in such conduct to award punitive damages to the plaintiff.

(8) That the application of attorneys' fees submitted by the attorneys by the plaintiff, demonstrates that Attorney Bernard Pafunda had 238.25 out-of-court hours in the case, and four (4) hours of in-court time. Attorney Carroll had 327.7 hours of out-of-court time in the case and five (5) hours of in-court time in the case. That Attorney Pafunda's hourly rate is one hundred twenty-five ($125.00) dollars per hour out of court, one hundred sixty-five ($165.00) per hour in court. Attorney Carroll's rate is eighty-five ($85.00) dollars per hour out of court, one hundred twenty-five ($125.00) dollars per hour in court.

(9) That reasonable attorneys' fees are assessable against the defendants pursuant to 42 USC Section 1988, as costs.

CONCLUSIONS OF LAW

(1) That the sum of forty-three thousand five hundred ($43,500.00) dollars represents a fair measure of damages to compensate the plaintiff for the deprivation of his constitutional rights as heretofore found and Ordered by the Court, and judgment in said amount should be entered herein in favor of the plaintiff. No damages should be awarded to plaintiff for loss of equity or market value.

(2) Punitive damages are not appropriate under the factual circumstances of this case, and such an award should not be entered herein.

(3) That attorneys' fees in favor of attorneys for the plaintiff should be assessed against the defendants as costs. The proper measure of such attorneys' fees is established in *Louisville Black Police Officers vs. City of Louisville* 700 F.2d 268 (6th Cir. 1983) by multiplying the number of hours to be compensated times the reasonable rate of compensation per hour, times a contingency factor of 33.33 percent to compensate the attorneys for the risk of no recovery in addition to the period of time for which they had to wait for said attorneys' fees. That applying the said formula to the facts in the instant case, that Attorney Pafunda should be awarded the amount of forty thousand five hundred eighty eight and thirty three ($40,588.33) dollars and Attorney Carroll should be awarded the sum of thirty-seven thousand nine hundred seventy two and sixty-seven ($37,972.67) for their services herein, all of which is assessable against the defendants.

JUDGMENT

(1) That the plaintiff shall have and recover of the defendants, and each of them, jointly and severally, the sum of forty-three thousand five hundred ($43,500.00) dollars for compensatory damages herein, and zero dollars ($0.00) as punitive damages.

(2) That the plaintiff shall recover legal interest on said amount from and after the date hereof until paid.

(3) That the plaintiff shall recover his cost incurred herein, including the sum of forty thousand five hundred

eighty-eight and thirty-three/100 ($40,588.33) dollars payable to Bernard Pafunda, Attorney at Law, and the sum of thirty-seven thousand nine hundred seventy-two and sixty-seven/100 ($37,972.67) payable to Pamela Carroll, Attorney at Law, for each of their services herein, pursuant to 42 USC Section 1988.

(4) This is a final and appealable Order.

This the 14th day of April, 1993.

/s/ Bayard V. Collier
Judge

DIVISION NO. I

COMMONWEALTH OF KENTUCKY
PIKE CIRCUIT COURT

Action No. 88-CI-667

FRED CASSITY d/b/a C & B TRUCKING - - - *Plaintiff*

v.

MILO BRYANT, SECRETARY, TRANSPORTATION CABINET; and
MARJORIE KLEE, COMMISSIONER, DEPARTMENT OF MOTOR VEHICLE REGISTRATION; and
WILLIAM DEBOARD, ACTING DIRECTOR, DIV. OF MOTOR CARRIERS; and
MARTIN SLONE - - - - - - - - - *Defendant*

ORDER—Entered February 2, 1990

Plaintiff, Fred Cassity, brought this action for damages under 42 USC Section 1983 following the seizure by the Transportation Cabinet of his Kenworth tractor/trailer. At the bench trial held January 3, 1989, the parties stipulated, and the Court finds, the following facts:

1. On April 8, 1988, defendant Martin Slone, acting in his capacity as a Highway Enforcement Officer, stopped the plaintiff's tractor/trailer and cited the driver for violations of KRS 138.665 (no Kentucky fuel user's license); KRS 281.615 (no authority); KRS 186.150 (resident not to use out-of-state license); and KRS 189.222 (vehicle overweight).

2. The defendants thereupon seized and impounded the tractor/trailer pursuant to KRS 138.990 (18) and the Transportation Cabinet's usual enforcement procedures.

3. The defendants acted in their official capacities and under color of state law and Cabinet regulations at all times pertinent to the action.

4. A hearing on the citation was scheduled in Pike District Court for April 26, 1988; however, the district court ruled that it was without jurisdiction regarding the seizure, and referred the matter to the Transportation Cabinet.

5. As of January 3, 1989, the Cabinet had not conducted any administrative hearing to determine whether the impoundment was lawful and proper.

6. The defendant released the subject trailer on May 20, 1988, to C & B Trucking, and released the Kenworth tractor on May 23, 1988, to the Citizens Bank of Pikeville.

The trial has presented a single question of law:

whether the seizure and impoundment of the plaintiff's truck, with no hearing either before the seizure or afterwards, deprived the plaintiff of a property interest without due process of law, and in violation of the Fourteenth Amendment to the United States Constitution. If such violation did occur, then the plaintiff is entitled to appropriate relief, and there arises a question of fact as to the amount of damages for which the defendants are liable.

42 USC Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

As it is agreed that the defendants acted in their official capacities and under color of state law, the narrow issue is whether the defendants deprived the plaintiff of his property in violation of the United States Constitution.

Having reviewed the briefs submitted by the parties, and having independently researched the issue, the Court concludes that the defendants did indeed unconstitutionally deprive the plaintiff of his property.

The parties contend as to the proper construction of the statute pursuant to which the defendants acted—KRS 138.990(18) (since renumbered as paragraph 15):

> In addition to the penalties provided in KRS 138.990 (17) [now (14)], the motor vehicle or vehicles of any person violating any provision of KRS 138.720 shall be subject to seizure by any officer duly authorized to enforce the provisions of KRS 138.655 to 138.725.

KRS 138.655 to 138.725 established motor fuels and weight-distance taxes for motor carriers; require licensing of carriers subject to the taxes before they use or continue to use the public highways; and authorize the bureau of vehicle regulation to adopt regulations relating to the administration and enforcement of KRS 138.655 to 725 and KRS 138.990.

KRS 138.990 (17) now (18)] provides that any person violating any provision of KRS 138.655 to 138.725 is guilty of a misdemeanor, and prescribes punishment.

KRS 138.720 states:

> With respect to KRS 138.655 to 138.725, it is unlawful for any person to:
>
> (1) Fail to pay the tax imposed;
>
> (2) Fail, neglect, or refuse to file any return in the manner or within the time required;
>
> (3) Make any false statement or conceal any material fact in any record, return, or affidavit;
>
> (4) Conduct any activities requiring a license without such license or after such license has been surrendered, cancelled or revoked;
>
> (5) Assign or attempt to assign a license; or
>
> (6) Violate any other provisions.

The legislature has made no express provision for proceedings which are to follow the seizure of a vehicle pursuant to KRS 138.990(18). Likewise the Transportation Cabinet has instituted no hearing process, the common practice in seizure cases being that the Division of Motor Carriers advises the carrier that release of the vehicle may be ef-

fected by curing the violations, e.g., by obtaining the necessary license.

The plaintiff urges a construction of KRS 138.990(18) requiring a hearing prior to seizure (and indeed the statute might easily be read to intend that seizure might ensue only upon conviction of a violation). The defendants propose that the statutory scheme is under constitutional scrutiny; that in cases such as this a reasonably prompt opportunity for a hearing after the seizure satisfies due process. But neither the constitutionality nor the proper construction of the statute is a material issue in the present case, as the plaintiff is entitled to relief in any event. While the Court may in passing express reservations as to the adequacy of the statute, considering its vagueness concerning post-seizure proceedings and disposition of impounded propriety, and in view of the broad range of misconduct (under KRS 138.720) for which seizure is authorized, decisions of such questions is not necessary— and therefore not rendered— in this action. Had the District Court found jurisdiction in this matter, or had the agency provided a framework for post-seizure hearings, then the question of whether such proceedings afforded due process of law would be in issue. But in this case there was available to the plaintiff no hearing, judicial or administrative, pre- or post-seizure; it is beyond question that such application of the statute deprives a person of property without due process of law.

The defendants would revive the issue, contending that the plaintiff could have had a prompt post-seizure hearing before the Kentucky board of tax appeals pursuant to KRS 138.729, which provides:

> Any final ruling of the bureau of vehicle regulation with regard to 138.725 shall be appealed to the Kentucky board of tax appeals.

The difficulty with this argument is that in this case there was no "final ruling" of the agency from which to appeal. A final ruling is ordinarily thought of as emerging from a formal, regulated administrative process wherein adverse

positions are presented by the parties and weighed by the forum; it is unlikely that the legislature intended that due process should be initiated only upon appeal.

The Court concludes that the defendants did, acting under color of state law, deprive the plaintiff of a property interest without due process of law, and in violation of the United States Constitution, and are therefore liable for damages pursuant to 42 USC Section 1983.

The issue of damages is reserved by the Court for further proceedings.

This the 2nd day of February, 1990.

/s/ Bayard V. Collier
JUDGE